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Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1985

CHARLES REED AND ROLAND DUTY
PETITIONERS,
VS.
JAMES TERRELL, SUE RAYBOLD,
BILL LOGUE, JOE JOHNSON, AND
THE STATE BAR OF TEXAS,
RESPONDENTS

# PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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## QUESTIONS PRESENTED

1. Whether state-court defendants deprived of property without notice pursuant to orders from state judges under the arbitrary state civil statute, V.T.C.A., Family Code Section 11.18(a), which is applied only against men, are precluded from raising these claims in federal court, even when the claims are not barred in state court?

2. Whether federal declaratory relief is precluded when there is a genuine threat of enforcement of the arbitrary state civil statute, V.T.C.A., Family Code Section 11.18(a), which is applied only against men?

3. Whether the State Bar of Texas, a department of the state judiciary, may be enjoined from continuing to instruct

lawyers to unconstitutionally discriminate against men, and may be assessed damages for injuries resulting from application of these instructions?

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II. This Court has repeatedly ruled that 42 U.S.C. Section 1983 applies against state judicial action, and the Fifth Circuit's ruling in this case that state-court defendants deprived of property without

notice pursuant to orders from state judges under the arbitrary state civil statute, V.T.C.A., Section 11.18(a), which is applied only against men, are precluded from raising these claims in federal court, would destroy those precedents in the Fifth Circuit.....26

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## OPINIONS BELOW

The opinion of the United States District Court, the Honorable Lucius Bunton presiding, appears in the appendix (Appendix A, pp. A-1 to A-5). The two orders by Judge Bunton denying a rehearing also appear in the appendix (Appendixes B and C, pp. A-6 to A-9).

The opinions of the United States Court of Appeals for the Fifth Circuit finding for Respondents and denying Pe-

titioners' request for rehearing en banc appear in the appendix (Appendixes D and E, pp. A-10 to A-21).

## JURISDICTIONAL STATEMENT

On May 6, 1985, the United States Court of Appeals for the Fifth Circuit in New Orleans, Louisiana, entered judgment and filed an opinion (Reed v. Terrell, 759 F. 2d. 472) finding for the Respondents. Petitioners, on May 15, 1985, filed a Petition for Rehearing En Banc, which was denied by the Fifth Circuit Court of Appeals on June 7, 1985.

This Court's jurisdiction is invoked under 28 U.S.C. Section 1254 and Rules of the Supreme Court, No. 20 (1980).

## CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Fourteenth Amendment to the Constitution of the United States provides as follows:

> No state shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. Section 1983 provides as follows:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

28 U.S.C. Section 1343(a) provides as follows:

> The district court shall have original jurisdiction of any civil action authorized by law to be commenced by any person:
> (3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;
> (4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights including the right to vote.

28 U. S. C. Section 2201 provides that:

> In a case of actual controversy within its jurisdiction, except with respect to Federal taxes other than actions brought under Section 7428 of the Internal Revenue Code of 1954, or a proceeding under Section 505 or 1146 of Title 11, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party

> seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

The disputed state statute, V.T.C.A., Texas Family Code, Section 11.18(a), provides as follows:

> In any proceeding under this subtitle, including, but not limited to, habeas corpus, enforcement, and contempt proceedings, the court may award costs. Reasonable attorney's fees may be taxed as costs, and may be ordered paid directly to the attorney, who may enforce the order for fees in his own name.

## STATEMENT OF THE CASE

The long history of discrimination against husbands and ex-husbands in Texas' family courts, from the district level to the Texas Supreme Court, is reflected in Texas case law and publications of the State Bar of Texas.

V.T.C.A., Family Code Section 11.18(a) was enacted by the Texas Legislature in 1975, and provided for assessment of attorney's fees in divorce, custody, visitation, and support cases, without any fixed standards as to when, or against whom, the law was to be applied. The Statute is completely discretionary, and creates no right to attorney's fees in any case, no matter what facts are proved.

In Texas, attorney's fees are permitted only where provided for by contract or by statute. Statutes providing for attorney fees are "in derogation of the common law",

"punitive in nature", and "must be strictly construed". With the exception of Section 11.18(a), Texas statutes which provide for attorney's fees exist solely for the punishment of intentional torts which are specifically proscribed by law. Section 11.18(a) is incapable of strict construction because it is arbitrary, vague, indefinite, devoid of ascertainable standards, and does not give fair notice as to what facts are to be proved, or what behavior is proscribed.

As predicted by University of Texas Law Professor John Sampson in 1975 (Texas Tech Law Review), Section 11.18(a) has resulted in unconstitutional, defacto discrimination against fathers, husbands, and ex-husbands. At the time Petitioners filed this federal complaint, they had been unable to locate even one instance where Section 11.18(a) had ever been applied

against a woman.

The State Bar of Texas published results of a study entitled A Survey of Discrimination, in the State Bar Section Report, Family Law, Vol. 82-1, Spring 1982, which contained 25 cases where Section 11.18(a) was applied, all of them against men. As of 1984, V.T.C.A. contained 13 cases where Section 11.18(a) was applied, all of them against men. Section 11.18(a) has been applied 6 times against Petitioners, even when they were successful litigants, and has never been applied against their ex-wives, even when they were unsuccessful litigants.

Section 11.18(a) has been used as a financial hurdle to discourage fathers from exercising their constitutional right to defend their parental rights and property in court, and has been used to encourage wives and ex-wives to file frivolous suits

concerning divorce, custody, visitation, and support. The Section has been used by state judges to harass and intimidate fathers, and to punish them for attempting to defend their rights in court.

On July 17, 1978, Petitioner Roland Duty was ordered by Respondent State District Judge Bill Logue to pay $2900 in attorney's fees to Respondent Sue Raybold, under Section 11.18(a), for Raybold's prosecution of an uncontested, agreed, no-fault divorce on behalf of Duty's wife. Having previously entered a detailed property settlement agreement disposing of all issues between Duty and his wife, and on the advice of his attorney, Duty was not even present at the final hearing.

When Duty learned of the judgment issued against him and wanted to appeal, his attorney advised that it would be useless to do so since Judge Logue had the

discretion to issue the order under the law.

Respondent State District Clerk Joe Johnson entered the judgment against Duty, and it was enforced by the McLennan County Sheriff's Department in September 1979.

On November 1, 1979, Petitioner Charles Reed was ordered by Judge Logue to pay Respondent James Terrell attorney's fees of $819.27, under Section 11.18(a), for Respondent Terrell's representation of Reed's ex-wife in a post-divorce visitation and child support trial, even though Reed was a successful litigant. District Clerk Johnson entered the judgment, and it was enforced by the McLennan County Sheriff's Department in February 1980, when the entire proceeds of Reed's bank account were attached, including more than $700 in excess of the amount necessary for the judgment.

On January 29, 1981, Reed was ordered by Judge Logue to pay attorney's fees of $2500.00 to Terrell, under Section 11.18(a), for Terrell's representation of Reed's ex-wife in a post-divorce custody, visitation, and child support trial. State District Clerk Joe Johnson entered the judgment, and the McLennan County Sheriff's Department subsequently made several unsuccessful attempts to enforce it.

Since before April 12, 1978, and on numerous occasions thereafter, the State Bar of Texas has conducted legal education seminars for the purpose of certifying family law "specialists". Materials published for these seminars tell lawyers how to act in concert with judges and other state officials to apply provisions of the Texas Family Code, including Section 11.18(a), so as to deny the equal protection of the laws to fathers, husbands, and

ex-husbands.

The State Bar conducted one such seminar on November 12, 1981, in Dallas. At the seminar, lawyers were instructed to advise their female divorce clients to steal all the money in the family joint checking and savings accounts, use the money to purchase jewelry and other valuables which the judge would likely award to the wife, pay legal fee "deposits" to the lawyer (in excess of his projected fee so the lawyer could conceal these community assets from the court and return the remaining funds to the wife after the divorce), and then ask the court to order the husband to pay the wife's attorney's fee from his future earnings claiming she is unable to pay her attorney.

On March 30, 1982, Judge Logue, at Terrell's request, set a hearing for April 16, 1982, to determine whether Reed and his

present wife, Sharon, should be ordered to deliver the entire proceeds of his government paycheck to the McLennan County Sheriff, for an indefinite period, to be delivered to Terrell, even though Terrell had no judgment whatever against Reed's wife, and even though such an order would have no pretense of legality under Texas law. Terrell knew at the time that Reed's wife had three weeks earlier given birth to a child and could not work to support the family in the event his injunction was granted.

On April 16, 1982, at 10 A.M. Reed and Duty filed a Verified Federal Complaint in the United States District Court for the Western District of Texas at Waco, claiming that V.T.C.A., Family Code Section 11.18(a) is unconstitutional because it contains no ascertainable standards governing its application, and is applied only against men.

Petitioners requested that the Court declare the statute unconstitutional under the 14th Amendment's due process and equal protection clauses, issue a temporary restraining order, and, upon hearing, a preliminary injunction to halt Terrell's illegal and unconstitutional injunctive proceedings against Reed and his wife in state court, issue a permanent injunction against enforcement of the statute, and set a jury trial to assess damages for deprivations of constitutional rights under 42 U.S.C. 1983, 1985, and 1986, including damages against Terrell for the intentional infliction of emotional harm.

On April 16, 1982, at 2:30 p.m., a hearing was held in state court to determine whether a temporary injunction should be issued ordering Reed and his wife to deliver the entire proceeds of his government paycheck to the McLennan County

Sheriff, for delivery to Terrell. At the hearing, Reed raised his federal claims in state court for the first time, claimed that Section 11.18(a) is unconstitutional, furnished the Court a copy of the federal complaint filed earlier that day, and moved that the Court continue the case until the federal court ruled on the constitutionality of Section 11.18(a). The motion was denied, even though the issue was then before the federal court, and the state court no longer had jurisdiction according to state law.

During the state-court hearing on April 16, 1982, at which Reed represented himself, Reed was asked by Terrell whether Reed would obey any order from a Sheriff's deputy to turn over all the money in Reed's possession. Reed refused to speculate on his future behavior. Terrell then had Reed served with an execution by an armed

Sheriff's deputy while Reed sat on the witness stand. When Reed objected to the deputy's presence in the courtroom, the state judge recessed the hearing to allow the deputy to serve the execution. Reed refused to move from the witness stand during the recess. When the hearing resumed, Reed again objected to the deputy's serving an execution in court. The judge then ordered a second recess to allow the execution to be served, thereby denying Reed sanctuary to appear in court and defend his property without intimidation and harassment. When ordered to surrender all the money in his possession, Reed, fearful that he might be illegally imprisoned, complied with the order, and surrendered $9.15. Terrell's request for a temporary injunction was denied.

Reed's request for a temporary restraining order from the federal court was

denied on April 26, 1982, by United States District Judge James Nowlin. Reed's second request for a temporary restraining order was denied on May 4, 1982, by Judge Nowlin.

On May 12, 1982, trial on the merits was held in Terrell's state-court suit for an injunction against Reed and his wife, Sharon. Terrell's request for a permanent injunction was denied without comment concerning Reed's federal claims. The judgment against Reed for $2500.00 has never been enforced.

On May 14, 1982, Duty was tried for contempt of court in a suit brought by Duty's ex-wife, who was represented by the Texas Department of Human Resources. The suit was filed on April 13, 1982, by state's attorney Don Raybold, husband of Respondent Sue Raybold. The Court found that Duty was not in contempt, but nevertheless ordered him to pay attorney fees of

$200, and court costs of $74, to the Texas Department of Human Resources, despite Duty's notice to the court that the constitutionality of Section 11.18(a) was then before the federal court. In the same order, Duty was also ordered to pay the state $500 in attorney fees in the event he appealed the decision. The State was awarded attorney's fees at the rate of $40 per hour, even though their attorney, Raybold, was paid at the rate of $12 per hour.

Duty appealed the decision assessing attorney fees against him on the ground that he was a successful litigant. The Tenth Court of Civil Appeals in Waco affirmed the decision in 1983. Duty attempted to appeal to the Texas Supreme Court, but the Supreme Court refused to hear the case.

In June 1983, Duty filed a second fed-

eral complaint, requesting an injunction to prevent his imprisonment, or the seizure of his property to enforce the judgment for $700 in legal fees to the state for his trial and appeal. He then requested, and was granted, a dismissal of the second federal case, without prejudice, with permission to combine the second federal case with this federal case in the form of a supplement.

On October 24, 1983, upon only two hours notice to Petitioners, which is insufficient notice to afford due process for pro se litigants, a hearing was held on Respondents' motions to dismiss on the pleadings. Motions to dismiss were granted for all Respondents, and announced in court by United States District Judge Lucius Bunton.

A motion for rehearing was denied by Judge Bunton on November 4, 1983. A second

motion for rehearing was denied by Judge Bunton on November 28, 1983.

On December 29, 1983, pursuant to the Federal Rules of Appellate Procedure, Petitioners filed a timely notice of appeal with the Clerk of the District Court.

Duty was cited to appear in State District Court on July 5, 1984, to show cause as to why he should not be imprisoned for failure to pay the $700 judgment for attorney's fees to the State of Texas. Duty again called the Court's attention to the fact that the constitutionality of Section 11.18(a) was before the federal courts. Duty was found in contempt for failure to pay the $700 in attorney fees at issue in the federal case, which was still pending at the time. In addition, he was ordered to pay $400 in attorney fees for the hearing just completed, or to be imprisoned immediately, without even the opportunity

to appeal. Duty was not imprisoned because he paid, to avoid illegal imprisonment, $1200 in attorney fees and $74 in court costs. Despite the fact the court's decision was obviously illegal and unconstitutional on its face, for a number of reasons, Duty realized any appeal would again prove futile, and no appeal was taken.

On December 28, 1984, Reed had legal custody of his child, Michael, taken from him without notice, without hearing, and without even the filing of a motion as required by state law. Terrell prepared the order for this illegal change of custody, and it was signed and entered by State District Judge Ray Mormino. Reed twice petitioned the Texas Supreme Court for a writ of Mandamus to have the illegal and unconstitutional custody order set aside. Even though the order had no pretense of legal-

ity or constitutionality, the Texas Supreme Court twice denied the writ.

Subsequent to Petitioner's Notice of Appeal on December 29, 1983, all records, briefs, and oral arguments were presented to a panel of the United States Court of Appeals for the Fifth Circuit.

Oral arguments before the Fifth Circuit were set for March 7, 1985, at 9:00 a.m. in New Orleans, and announced approximately a month before that date. Terrell filed a frivolous motion against Reed in state-court and set the hearing for 2 p.m., March 6, 1985. This would have left Reed less than 18 hours to travel the 500 mile distance to New Orleans, Louisiana, for oral arguments before the Fifth Circuit. Terrell's scheme to use the state court to interfere with Reed's ability to prosecute this federal suit failed because Reed left Waco, Texas a week before March

7, and was never served notice of the state-court hearing.

The Fifth Circuit affirmed the judgment of the District Court in an opinion rendered on May 6, 1985, (Reed v. Terrell, 759 F. 2d. 472).

On May 15, 1985, pursuant to the Federal Rules of Appellate Procedure and Local Rules of the United States Court of Appeals for the Fifth Circuit, Petitioners requested a rehearing en banc by the entire Fifth Circuit Court of Appeals. The rehearing was denied on June 7, 1985.

Petitioners then petitioned this Court for a Writ of Certiorari.

## REASONS FOR GRANTING THE PETITION

I. THIS COURT HAS RULED THAT STATE-COURT JUDGMENTS HAVE THE SAME PRECLUSIVE EFFECT IN FEDERAL COURT AS IN STATE COURT, AND

THE FIFTH CIRCUIT'S RULING IN THIS CASE THAT STATE-COURT DEFENDANTS DEPRIVED OF PROPERTY WITHOUT NOTICE PURSUANT TO ORDERS FROM STATE JUDGES UNDER THE ARBITRARY STATE CIVIL STATUTE, V.T.C.A., FAMILY CODE SECTION 11.18(a), ARE PRECLUDED FROM RAISING THESE CLAIMS IN FEDERAL COURT, EVEN THOUGH THE CLAIMS ARE NOT BARRED IN STATE COURT, WOULD DESTROY THAT PRECEDENT IN THE FIFTH CIRCUIT.

This Court ruled in Migra v. Warren City School District Board of Education, 104 S. Ct. 892, that state court judgments have the same preclusive effect in 42 U.S.C. Section 1983 suits as in state court. Yet, in the instant case, the Fifth Circuit completely disregarded the law of the state of Texas in applying collateral estoppel where it would not apply under state law.

In Texas, "the failure of a court to observe a mandatory constitutional provision. . . forbidding a particular action will render its judgment absolutely void.

(emphasis added) 34 Tex Jur 2d, Judgments, Section 313, p. 279.

On the subject of collateral estoppel, 34 Tex Jur 2d, Judgments, Section 260, p. 169, states:

> "The doctrine that a judgment may not be impeached in a collateral proceeding applies only to judgments that are not void, for if a judgment is in fact a nullity, there is no reason why it should not be declared so whenever the occasion arises. (emphasis added) Although a void judgment may be attacked directly, as well as collaterally, there is no necessity for doing so; it need not be vacated or set aside; it may simply be ignored. And when some right is asserted under the judgment, its invaldity may be pointed out by anyone in any kind of proceeding, in any court, and at any time. (emphasis added) In other words, it may be attacked collaterally."

In the present case, the sole authority for the unconstitutional judgments complained of is the unconstitutional statute, V.T.C.A., Family Code Section 11.18(a), which is repugnent to both the due process and equal protection clauses of the 14th

If Section 11.18(a) is unconstitutional, either on its face or as applied, as Petitioners claim it is, then any judgment issued under it is "absolutely void" under Texas law, and may be attacked collaterally in federal court. Thus, there is no valid foundation for the Fifth Circuit's application of a rule of collateral estoppel which does not exist in Texas. If this error by the Fifth Circuit is not corrected, it will undermine the intent and effect of 42 U.S.C. Section 1983, and destroy this Court's precedent in Migra, supra, in the Fifth Circuit.

II. THIS COURT HAS REPEATEDLY RULED THAT 42 U.S.C. SECTION 1983 APPLIES AGAINST STATE JUDICIAL ACTION, AND THE FIFTH CIRCUIT'S RULING IN THIS CASE THAT STATE-COURT DEFENDANTS DEPRIVED OF PROPERTY WITHOUT NOTICE PURSUANT TO ORDERS FROM

STATE JUDGES UNDER THE ARBITRARY STATE CIVIL STATUTE, V.T.C.A., FAMILY CODE SECTION 11.18(a), WHICH IS APPLIED ONLY AGAINST MEN, ARE PRECLUDED FROM RAISING THESE CLAIMS IN FEDERAL COURT, WOULD DESTROY THOSE PRECEDENTS IN THE FIFTH CIRCUIT.

Notwithstanding the misapplication of collateral estoppel in this case, the Fifth Circuit ignored a long line of precedents by this Court beginning with Mitchum v. Foster, 407 U.S. 225, 92 S.Ct. 2151, holding that 42 U.S.C. Section 1983 applies against state judicial action. The Fifth Circuit's decision in this case would establish in the Texas state courts a protected haven for the violation of constitutional rights beyond the reach of the federal courts, in direct contradiction to this Court's holding in Mitchum v. Foster, supra.

It is a gross denial of the due process right to a fair tribunal to require a

civil rights litigant to submit his federal claims to be determined by the very persons who perpetrated the constitutional deprivations in the first place. Yet, that is exactly what the Fifth Circuit ruled in this case, when it held that Petitioners should have submitted their constitutional claims, that state judges at every level were discriminating against them as a class, to be determined by those same state judges. Even a jury trial, under such circumstances would be wholly inadequate for purposes of due process.

This Court held in Mitchum v. Foster, supra., 407 U.S. at p. 240-241, 92 S. Ct. at p. 2161, that:

> It is clear from the legislative debates surrounding passage of Section 1983's predecessor that the Act was intended to enforce the provisions of the Fourteenth Amendment "against state action, whether that action be executive, legislative, or judicial. Ex Parte Virginia, 100 US 339, 346,(emphasis added by Court). Pro-

> ponents of the legislation noted that the state courts were being used to harass and injure individuals, either because the state courts were powerless to stop deprivations or were in league with those who were bent upon the abrogation of federally protected rights."

It is obvious in this case, and Petitioners have alleged, that the state courts are being used to harass Petitioners, because the state courts are in league with persons bent upon abrogation of federally protected rights. In Haring v. Prosise, 103 S.Ct. 2368, this Court recently reiterated the rule in Mitchum stating:

> "Adoption of petitioners'rule of preclusion would threaten important interests in preserving federal courts as an available forum for the vindication of constitutional rights."...
> "Defendants who have pleaded guilty and who wish to bring a Section 1983 claim would be forced to bring that claim in state court, if at all. Not only have petitioners failed to advance any compelling justification for a rule confining the litigation of constitutional claims to a state forum, but such a rule would be wholly contrary to one of the central concerns which motivated the enact-

> ment of Section 1983, namely, the 'grave congressional concern that the state courts had been deficient in protecting federal rights.' "

This Court ruled in Lugar v. Edmondson Oil, 102 S.Ct. 2744, that a state courts' deprivation of property without due process under an unconstitutional state law was actionable under Section 1983.

Petitioners have repeatedly been denied their most basic due process rights by state courts, have been repeatedly discriminated against by state courts because they are members of a despised minority class, divorced fathers, and have suffered these deprivations of constitutional rights along with thousands of other divorced fathers in Texas. Both Petitioners have sought relief in the Texas Courts of Appeal and the Texas Supreme Court, with no success.

Other Texas fathers have also been denied relief to which they were entitled, at every level by Texas' state courts. In Ridgway v. Baker, 720 F.2d. 1408, the Fifth Circuit found that Ridgway had been imprisoned for life in the Potter County Jail, without even the right to a lawyer, because he was so destitute he could not afford a lawyer, and his imprisonment had been sanctioned by the Texas Supreme Court.

Also, in Haring v. Prosise, supra., at page 2372, this Court stated:

> "(A)mong the most critical guarantees of fairness in applying collateral estoppel is the guarantee that the party to be estopped had not only a full and fair opportunity but an adequate incentive to litigate 'to the hilt' the issues in question."

It is clear that Petitioners have never had a "full and fair opportunity" in state court to "litigate to the hilt" the

issues raised against them there. Thus, the Fifth Circuit's decision in this case would provide an avenue for the states to circumvent the Fourteenth Amendment, without any risks whatever to the individuals who conspire to deny constitutional rights. This Court cannot allow such a decision to go uncorrected without seriously undermining the intent and effect of Section 1983, and destroying the precedents going back to Mitchum, supra.

III. THIS COURT HAS REPEATEDLY RULED THAT FEDERAL DECLARATORY RELIEF IS APPROPRIATE WHEN THERE IS A GENUINE THREAT OF ENFORCEMENT OF AN UNCONSTITUTIONAL STATE LAW, EVEN WHEN NO STATE LITIGATION IS PENDING, AND THE FIFTH CIRCUIT'S RULING IN THIS CASE THAT FEDERAL DECLARATORY RELEIF IS PRECLUDED WHEN THERE IS A GENUINE THREAT OF ENFORCEMENT OF THE ARBITRARY STATE CIVIL STATUTE, V.T.C.A., FAMILY CODE SECTION

11.18(a), EVEN WHEN STATE LITIGATION IS PENDING, WOULD DESTROY THOSE PRECEDENTS IN THE FIFTH CIRCUIT.

In this case, the Fifth Circuit panel ruled that the United States District Court lacked jurisdiction to declare Section 11.18(a) unconstitutional, even though the Petitioners attacked the constitutionality of the statute both on its face and as applied, invoked 28 U.S.C. Section 2201, and prayed that the statute be declared unconstitutional. Thus, the Panel's decision directly conflicts with a long line of precedents by this Court beginning with Steffel v. Thompson, 415 US 452, 474-475, 94 S. Ct. 1209, 1223-1224, wherein this Court stated:

> "Regardless of whether injunctive relief may be appropriate, federal declaratory relief is not precluded when no state prosecution is pending and a federal plaintiff demonstrates

> a genuine threat of enforcement of a disputed state criminal statute, whether an attack is made on the constitutionality of the statute on its face or as applied."

As alleged in Petitioner's complaint, Section 11.18(a) is applied in a discriminatory manner against men, and such an arbitrary classification serves no important governmental purpose. This Court ruled in Orr v. Orr, 440 U.S. 368, 99 S.Ct. 1102, that class-based discrimination which is not related to any important governmental objective is unconstitutional. In Yick Wo v. Hopkins, 118 U.S. 356, this Court ruled that a law, fair on its face, is unconstitutional when it is applied "with an evil eye and an unequal hand", as Section 11.18(a) is applied.

Neither the United States District

Court nor the Fifth Circuit has advanced any reason why collateral estoppel, even if applicable, has anything to do with Petitioners claims for prospective relief, including injunctive relief. The Fifth Circuit disregarded its own precedent in Gresham Park Community Organization v. Howell, 652 F 2d 1227, at 1236, wherein it stated:

> Where a party asks a federal court to declare a state court judgment null and void, we should consider this as praying for an injunction enjoining its enforcement.

The wording of the Fifth Circuit's opinion implies that Petitioners, by requesting more relief than they were entitled to, thereby forefeited the prospective relief requested to which they were otherwise entitled to. Such is unprecedented.

The Fifth Circuit's denial of prospec-

tive relief goes against a long line of precedents beginning with Steffel v.Thompson, supra. This Court recently reiterated those precedents in Pulliam v. Allen, 104 S.Ct.1970 (1984). While this federal case was pending, the unconstitutiional Section 11.18(a) was applied an additional three times against Duty, despite the lack of state court jurisdiction at those times.

Thus, it is clear, not only that there existed a genuine threat of enforcement of an unconstitutional state statute, the statute was enforced against Duty several times while the issue of its constitutionality was before the federal courts. There is no legal principle whatsoever to support the Fifth Circuit's denial of prospective declaratory relief, and their decision in this case would destroy the long line of Supreme Court precedents going back

to Steffel, supra, in the Fifth Circuit.

IV. THE FIFTH CIRCUIT DECIDED IN THIS CASE THAT THE CONDUCT OF THE STATE BAR OF TEXAS IN PUBLISHING MATERIALS AND CONDUCTING SEMINARS TELLING LAWYERS TO UNCONSTITUTIONALLY DISCRIMINATE AGAINST MEN IS NOT ACTIONABLE UNDER 42 U.S.C. SECTION 1983 AND 1985, AND THIS IMPORTANT FEDERAL QUESTION SHOULD BE DECIDED BY THIS COURT.

The Fifth Circuit ruled that Petitioner's claim that the State Bar of Texas had published materials and conducted seminars instructing lawyers in the practice of sexual discrimination, even if proved, was "without merit", citing no authority, thus concluding that Sections 1983 and 1985 afford no remedy for the planning of such intentional deprivations of constitutional rights.

This Court ruled in Palmore v. Sodoti, 104 S.Ct. 1879, that even where prejudice exists in society, the state cannot give effect, either directly or indirectly, to

such prejudice.

In Article 320 a-1, Vernon's Texas Codes Annotated, the State of Texas grants permission to sue the State Bar in its own name. Where the State Bar, a state agency, draws blueprints for constitutional deprivations, there is no reason why Sections 1983 and 1985 cannot be applied against the State Bar. To rule otherwise undermines the intent and effect of these Sections intended to provide a remedy for just such constitutional deprivations.

## CONCLUSION

Based on the foregoing arguments and authorities, the petitioners pray that their Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

It is hereby certified that service of this petition has been made on counsel for all respondents by mailing copies thereof on this 30th day of August, 1985, in envelopes, with postage prepaid, properly addressed to them as follows:

LaNelle McNamara
500 RepublicBank Tower
Waco, Texas 76701

Larry O. Brady
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Waco, Texas 76701-2195

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Austin, Texas 78711

Charles Reed

Charles Reed, pro se

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
WACO DIVISION

NO. W-82-CA-75

CHARLES REED AND
ROLAND DUTY,

Plaintiffs

VS.

JAMES TERRELL, SUE RAYBOLD,
BILL LOGUE, JOE JOHNSON AND
THE STATE BAR OF TEXAS,

Defendants

ORDER OF DISMISSAL

On this day came on to be considered the motions of Defendants, James Terrell, Sue Raybold, Bill Logue, Joe Johnson, and the State Bar of Texas, to dismiss Plaintiffs' suit against them; and the Court, having considered such motions and the arguments and authorities thereon, is of

the opinion that such motions are meritorious and should in all things be granted.

Plaintiffs herein are complaining of judgments entered against them in proceedings in the 19th District Court of McLennan County, Texas. The judgments awarded attorneys' fees to Defendants Terrell and Raybold, who were private attorneys representing the adversaries of Plaintiffs in the proceedings in State District Court. The judgments complained of were entered by Defendant Bill Logue, Judge of the 19th District Court of McLennan County, Texas, and were recorded by Defendant Joe Johnson, District Clerk of that court. The State Bar of Texas was joined as a defendant in this case based on allegations that the organization conducted seminars and published materials which instructed lawyers and

judges to enter judgments like those complained of by Plaintiffs.

Plaintiffs' complaints are framed as civil rights actions attacking the constitutionality of the judgments entered against them in the State District Court and the constitutionality of the Texas statute which authorizes awards of attorneys' fees in domestic relations cases brought in Texas courts. Although the complaint is cast as an action seeking redress for civil rights violations, the essential relief sought is review and reversal of the state court's judgments against Plaintiffs. Plaintiffs were entitled to attack the constitutionality of the judgments and the statute authorizing the judgments through appeals in the Texas courts and through appeal or petition for writ of certiorari in the Supreme Court of the United States.

Plaintiffs did not appeal from the judgments entered against them. Thus, the Texas state courts were not afforded an opportunity to review the judgments or the statute that are attacked in this action. This Court does not have, nor should it take, jurisdiction of actions which seek to review judgments that should have been attacked directly in a state court.

Furthermore, Plaintiffs have failed to state a Federal cause of action for which relief can be granted. In addition, all claims asserted against Defendant Raybold alone or in concert with the other Defendants are barred by the statute of limitations.

For the reasons stated above, and for other reasons cited in Defendants' Motions to Dismiss and their Briefs in support of the same, Plaintiffs' suit

should be dismissed.

It is therefore ORDERED, ADJUDGED and DECREED that the motions of Defendants, James Terrell, Sue Raybold, Bill Logue, Joe Johnson and the State Bar of Texas, to dismiss Plaintiffs' suit against them are hereby in all things granted, and Plaintiffs' suit as against said Defendants is hereby in all things dismissed at Plaintiffs' cost.

SIGNED AND ENTERED this 8th day of November, 1983.

/s/ Lucius D. Bunton

UNITED STATES DISTRICT JUDGE

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
WACO DIVISION

NO. W-82-CA-75

CHARLES REED, et al.

VS.

JAMES TERRELL, et al.

ORDER

Came on this day for consideration Plaintiffs' Motion for Rehearing and Relief from Judgment, following the Court's granting all Defendants' Motions to Dismiss. The Court is of the opinion that its Order of dismissal was, and continues to be appropriate; accordingly,

IT IS ORDERED that Plaintiffs' Motion for Rehearing and Relief from Judgment be and is hereby DENIED.

SIGNED and ENTERED this 4th day of November, 1983.

/s/ Lucius D. Bunton

UNITED STATES DISTRICT JUDGE

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
WACO DIVISION

NO. W-82-CA-75

CHARLES REED, et al.

VS.

TERRELL, et al.

ORDER

Came on this day for consideration Plaintiffs' Second Motion for Rehearing and/or Amendment of Judgment. The Court continues to be of the opinion that its ruling as originally entered is correct; accordingly,

IT IS ORDERED that Plaintiffs' Second Motion for Rehearing and/or Amendment of Judgment be and is hereby DENIED.

SIGNED and ENTERED this 28th day of November, 1983.

/s/ Lucius D. Bunton

UNITED STATES DISTRICT JUDGE

APPENDIX D

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 84-1010

D. C. Docket No. W-82-CA-75

CHARLES REED and ROLAND DUTY,

Plaintiffs-Appellants,

versus

JAMES TERRELL, ET AL.,

Defendants-Appellees.

Appeal from the United States District Court for the Western District of Texas

Before RANDALL, JOHNSON, and GARWOOD, Circuit Judges.

JUDGMENT

This cause came on to be heard on the record on appeal and was argued by appellants and counsel;

ON CONSIDERATION WHEREOF, It is now

here ordered and adjudged by this Court that the judgment of the District Court in this cause is affirmed;

IT IS FURTHER ORDERED that plaintiffs-appellants pay to defendants-appellees the costs on appeal, to be taxed by the Clerk of this Court.

May 1, 1985

ISSUED AS MANDATE: JUN 17 1985

A true copy 6/17/85

Test: GILBERT F. GANUCHEAU

Clerk, U. S. Court of Appeals, Fifth Circuit OP-JDT-11

By /s/ A. S. Rondeno

Deputy

New Orleans, Louisiana

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

CHARLES REED and ROLAND DUTY,

Plaintiffs-Appellants,

v.

JAMES TERRELL, ET AL.,

Defendants-Appellees

No. 84-1010

May 6, 1985.

Appeal from the United States District Court for the Western District of Texas.

Before RANDALL, JOHNSON, and GARWOOD, Circuit Judges.

JOHNSON, Circuit Judge:

Plaintiffs-Appellants Charles Reed and Roland Duty filed this suit under various statutory provisions, including 42 U.S.C. Sections 1983, 1985, and 1986. Reed and Duty claim that their constitutional rights of due process and equal protection were violated by the award of

attorney's fees to defendants Terrell and Raybold, who were the attorneys representing the ex-wives of Reed and Duty in state court divorce and custody proceedings. Reed and Duty base this claim on their assertion that section 11.18(a) of the Texas Family Code, although neutral on its face,[1] is discriminatorily applied by Texas state courts against men. In addition to the two attorneys, the plaintiffs named as defendants the Honorable Bill Logue, Judge of the 19th State District Court (the state district judge who entered the orders complained of); Joe Johnson, District Clerk for McLennan County (the district clerk who filed the

1. That section provides:

> In any proceeding under this subtitle, including, but not limited to, habeas corpus, enforcement, and contempt proceedings, the court may award costs. Reasonable attorney's fees may be taxed as costs, and may be ordered paid directly to the attorney,

orders); and the State Bar of Texas.[2] Plaintiffs sought declaratory relief, injunctive relief, and damages. Plaintiffs particularly sought reversal of the state court awards of attorney's fees against them.

Defendants moved to dismiss. On October 24, 1983, the federal district court granted the defendants' motion to dismiss following a hearing. In granting the defendants' motion to dismiss, the district court noted:

> Plaintiffs' complaints are framed as civil rights actions attacking the constitutionality of the judgments entered against them in the State Dis-

who may enforce the order for fees in his own name.

Tex.Fam.Code Ann. Section 11.18(a) (Vernon Supp. 1984).

2. Plaintiffs alleged that materials published by the State Bar indicated a conspiracy by members of the State Bar to cause the provisions of the Texas

trict Court and the constitutionality of the Texas statute which authorizes awards of attorneys' fees in domestic relations cases brought in Texas courts. Although the complaint is cast as an action seeking redress for civil rights violations, the essential relief sought is review and reversal of the state court's judgments against Plaintiffs. Plaintiffs were entitled to attack the constitutionality of the judgments and the statute authorizing the judgments through appeals in the Texas courts and through appeal or petition for writ of certiorari in the Supreme Court of the United States.

Family Code concerning legal fees to be enforced in a discriminatory manner against men. Plaintiffs allege that such action constitutes a violation of the Sherman Act in that it overcharges one group of consumers to the benefit of another. There is no merit to this allegation.

> Plaintiffs did not appeal from the judgments entered against them .... This Court does not have, nor should it take, jurisdiction of actions which seek to review judgments that should have been attacked directly in a state court.

In dismissing the plaintiffs' actions, the district court did not err. It is a well-settled principle that a plaintiff may not seek a reversal in federal court of a state court judgment simply by casting his complaint in the form of a civil rights action. Hagerty v. Succession of Clement, 749 F.2d 217, 220 (5th Cir.1984) (no jurisdiction to review state court judgment where appeal taken through state court system); Sawyer v. Overton, 595 F.2d 252 (5th Cir.1979). Moreover, the Supreme Court has stated that a "United States District Court has no authority to

review final judgments of a state court in judicial proceedings." District of Columbia Court of Appeals v. Feldman, 460 U.S. 462, 482, 103 S.Ct. 1303, 1315, 75 L.Ed.2d 206 (1983).[3] While a losing party in state court proceedings may be able in some instances to sue in federal court to "mount() a general challenge to the constitutionality" of a statute or rule, Feldman, 460 U.S. at 483, 103 S.Ct. at 1316, no such situation is presented in the instant case. As the federal district court in the instant case noted, the "essential relief" sought by the plaintiffs is reversal of the state court award of attorney's fees against them.

3. Moreover, the Supreme Court has noted that "a petitioner's failure to raise his constitutional claims in state court does not mean that a United States District Court should have jurisdiction over the claims." Feldman, 460 U.S. at 482, n. 16, 103 S.Ct. at 1315 n. 16. Indeed, such failure may lead the party to "forfeit

District Court op. at 1. Indeed, this Court's review of the record in the instant case reveals that the plaintiffs' suit is "patently an attempt to collaterally attack the validity of (the state court judgment)." Almon v. Sandlin, 603 F.2d 503, 506 (5th Cir.1979). See also Kimball v. Florida Bar, 632 F.2d 1283, 1284 & n. 3 (5th Cir.1980) (federal complaint, in essence, sought reversal of state court judgment although cast in form of general constitutional attack). A review of the plaintiffs' pleadings and arguments in the instant case reveals that this suit is "inextricably intertwined" with the state court's awards against the plaintiffs. Feldman, 460 U.S. at 483, n. 16, 103 S.Ct. at 1315, n.

his right to obtain reviewof the state court decision in any federal court." Id.

16. Thus, the district court did not err in dismissing the instant suit for want of jurisdiction.

Accordingly, the judgment of the district court is

AFFIRMED.

APPENDIX E

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

---

No. 84-1010

---

CHARLES REED and ROLAND DUTY,

Plaintiffs-Appellants

versus

JAMES TERRELL, ET AL.,

Defendants-Appellees.

---

Appeal from the United States

District Court for the

Western District of Louisiana (sic)

---

ON SUGGESTION FOR REHEARING EN BANC

(Opinion May 6, 5 Cir., 1985, ___F.2d___)

(June 7, 1985)

Before RANDALL, JOHNSON and GARWOOD,

Circuit Judges.

PER CURIAM:

Treating the suggestion for rehearing en banc as a petition for panel rehearing, it is ordered that the petition for panel rehearing is DENIED. No member of the panel nor Judge in regular active service of this Court having requested that the Court be pclled on rehearing en banc (Federal Rules of Appellate Procedure and Local Rule 35), the suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Sam Johnson

United States Circuit Judge

6-3-85

U.S. COURT OF APPEALS

FILED

JUN 7 1985

GILBERT F. GANUCHEAU

CLERK

Supreme Court, U.S.
FILED
OCT 4 1985
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-373

In The
# Supreme Court of the United States
October Term, 1985

CHARLES REED AND ROLAND DUTY,
*Petitioners,*

v.

JAMES TERRELL, SUE RAYBOLD, BILL LOGUE, JOE JOHNSON, AND THE STATE BAR OF TEXAS,
*Respondents.*

## RESPONDENT SUE RAYBOLD'S OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS

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## REPLY TO QUESTIONS PRESENTED

The "questions presented" by petitioners are presented in a slanted, biased, and argumentative fashion, assume facts, misstate the law, and fail to present the actual factual foundation of this lawsuit, and therefore should not be considered by this Court.

Specifically, the statute in question, Family Code § 11.18(a), is not arbitrary, and does not apply only against men. Further, the claims raised in federal court *would be barred* in state court. Further, petitioners seek relief, declaratory or otherwise, not from enforcement of a statute, but from state court money judgments rendered in civil actions which were not appealed but which were allowed to become final and which are not void. Petitioners raised no constitutional issues in state court, but now ask the federal courts to relieve them of the obligations and effect of those judgments.

In addition, the "precedent" asserted by petitioners is not on point and is in no manner violated by, nor does it conflict with, the judgments of the district and circuit courts, which are fully supported by their own precedent.

For these reasons, as well as those discussed below, the "questions presented" do not present an issue appropriate for review by this Court.

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No. 85-373

In The
# Supreme Court of the United States
October Term, 1985

CHARLES REED AND ROLAND DUTY,
*Petitioners,*
v.
JAMES TERRELL, SUE RAYBOLD, BILL LOGUE, JOE JOHNSON, AND THE STATE BAR OF TEXAS,
*Respondents.*

## RESPONDENT SUE RAYBOLD'S OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS

### OPINION BELOW

The judgments and opinions in the courts below are attached as appendices to petitioners' petition.

### STATEMENT OF THE CASE

The statement included in the petition contains material largely outside the record, slanted and argumenta-

tive presentation of the proceedings below, misstatements of the state law, facts assumed but not in evidence, sarcasm, and other improper material. The procedural outline, relieved of all the foregoing, is essentially correct.

---

## REASONS FOR DENYING THE WRIT

### I.

### The Holdings Of The District Court And Court Of Appeals Are Based On A Long Standing Principle That The Federal Courts Are Not Courts Of Appeal With Powers Of Review Over State Court Judgments.

Petitioners' § 1983 claim is no more than an effort to attack collaterally, and achieve federal court review of, various final state court orders and judgments rendered in connection with domestic matters. It has been consistently held that this is impermissible, because federal courts do not sit in review of state court judgments. Petitioners' remedy, if they had a complaint with the state court judgments on grounds of unconstitutionality of the underlying statute, was to appeal through the Texas state courts and apply from there to this Court for writ of certiorari. Their remedy was not to file a separate federal suit seeking relief from those judgments. *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 482, 103 S.Ct. 1303, 75 L.Ed. 2d 206, 222-23 (1983); *Olivares v. Martin*, 555 F.2d 1192, 1195 (5th Cir. 1977); *Almon v. Sandlin*, 603 F.2d 503, 506 (5th Cir. 1979); *Sawyer v. Overton*, 595 F.2d 252 (5th Cir. 1979).

Petitioners have sought to disguise their efforts to achieve review of the final state court judgments by characterizing their suit as a § 1983 action for deprivation of civil rights. It has been consistently held that "a plaintiff may not seek a reversal of a state court judgment simply by casting his complaint in the form of a civil rights action." *Hagerty v. Succession of Clements,* 749 F.2d 217, 220 (5th Cir. 1984); *Sawyer v. Overton, supra,* 595 F.2d at 252.

Petitioners seek relief from the final state court judgments on the basis that the statute on which it was based is void. *Relief from final judgments is not available on this basis.*

Petitioners allowed the challenged judgments for attorney's fees to be rendered against them without raising a question as to the constitutionality of the underlying statute. They allowed those judgments to become final and, for the most part, to be enforced. Those judgments were not void. Even were Family Code § 11.18(a) to be held invalid in a subsequent ruling in another forum, this would have no effect on the binding nature of those judgments. There is no procedural or legal basis for this Court to review those judgments, and no basis for review of any issue petitioners seek to raise, as no determination concerning the constitutionality of the underlying statute can have any effect on the final state court judgments against petitioners.

The sole method for seeking review of and relief from a state court judgment is to appeal to the state court of last resort and from there seek a petition for writ of certiorari to this Court. 28 U.S.C. § 1257; *Hagerty v. Succession of Clements, supra,* 749 F.2d at 220: "To the extent

that there was any constitutional error in the [state] court's decision, sole recourse . . . was to the United States Supreme Court, not to federal district court."

Because this case is an effort to achieve federal court review of final and unappealed state court judgments, not properly, by application for writ of certiorari, but through a separate and collateral lawsuit, the lower courts were correct in dismissing this action, and there is no basis whatsoever for review of those courts' decisions by this Court.

## II.

### The District Court's Dismissal Is Consistent With Other Fifth Circuit Cases, Holdings Of The United States Supreme Court, And State Law.

Petitioners assert as a basis for review by this Court that the attack made in district court on the final state court judgments would not be precluded if asserted in state court and so is not precluded in federal court. They argue that (1) the state court judgments are void; (2) under state law may be collaterally attacked at any time; and (3) so may be collaterally attacked in federal court.

Petitioners' argument suffers from several infirmities.

A state court judgment may not be reviewed by a federal district court. Review of a judgment of a state court of last resort is possible only in the United States Supreme Court. *District of Columbia Court of Appeals v. Feldman, supra,* 460 U.S. at 482; 72 L.Ed. 2d at 222-23; *Almon v. Sandlin, supra,* 555 F.2d at 1196; *Razatos v. Colorado Supreme Court,* 746 F.2d 1429, 1432 (10th Cir. 1984).

However, petitioners have not sought review of the decisions of the *highest* state court, but simply of state trial court judgments, which were not appealed and became final. Petitioners made no effort to appeal the state court judgments; however, they now seek relief from the federal courts liberating them from the effects of those judgments. Because petitioners did not take the steps available to them in the state courts to attack the judgment they may not complain in another forum of matters that should have been raised there.

Petitioners contend that under Texas law a "void" judgment can always be attacked at any point in any court, and that the district court's dismissal of their suit violates this policy. Petitioners are incorrect in their basic premise.

A judgment is based on a statute later declared to be unconstitutional is not rendered "void." *King v. King,* 291 S.W. 645 (Tex. Civ. App.—San Antonio 1927, writ dism'd). It is merely erroneous and is binding unless and until regularly set aside or reversed. *Commonwealth of Massachusetts v. Davis,* 140 Tex. 398, 168 S.W.2d 216, 220 (1942), cert. den., 320 U.S. 210. See Annotation: Validity and Effect of Judgment Based upon Erroneous View as to Constitutionality or Validity of a Statute or Ordinance Going to the Merits, 167 A.L.R. 517, 532. In *Chicot County Drainage District v. Baxter State Bank,* 308 U.S. 371, 60 S.Ct. 317, 84 L.Ed. 329 (1940) this Court held that the existence of a statute which has been declared unconstitutional is an operative fact which cannot be ignored. The effect of its unconstitutionality cannot be determined simply by applying "retroactive invalidity." Petitioners

cite no authority for the proposition that such a judgment is void.

If a court has jurisdiction of parties and subject matter, the judgment is not void, no matter how erroneous it may be. *Martin v. Sheppard,* 145 Tex. 639, 201 S.W.2d 810, 812 (1947). If a collateral attack is to be successful the record must affirmatively reveal a jurisdictional defect. *White v. White,* 142 Tex. 499, 179 S.W.2d 503, 506 (1944). There has been no suggestion that the state district courts had no jurisdiction.

Moreover, the Texas Supreme Court has recently held that an arguably "void" judgment must be attacked by appeal or bill of review, and has rejected the concept that a void judgment may be attacked in any manner at any time. *Middleton v. Murff,* 689 S.W.2d 212, 213 (Tex. 1985).

Under both Texas and federal law, the issue of the constitutionality of a statute can be waived if not raised in the lower court. *District of Columbia Court of Appeals v. Feldman, supra,* 460 U.S. at 482 n. 16, 75 L.Ed.2d at 223 n. 16; *Cardinale v. Louisiana,* 394 U.S. 437, 438, 89 S.Ct. 1161, 22 L.Ed.2d 398, 400 (1969); *Almon v. Sandlin, supra,* 603 F.2d at 506. *Babcock v. State,* 668 S.W.2d 857, 861 n. 4 (Tex. App.—Austin 1984, writ ref'd n.r.e.); *Jackson v. Leonard,* 578 S.W.2d 879, 882 (Tex. Civ. App.—Houston [14th Dist.] 1979, writ ref'd n.r.e.). Petitioners seek review and expunction of the judgments of the state district courts on grounds of unconstitutionality but did not raise that

ground at any point in the trial court or on direct appeal from those judgments. Even if this collateral proceeding attacking those judgments were permissible, which it is not, the issue of constitutionality has been waived.

Petitioners, citing as "precedent" *Migra v. Warren City School District Board of Education,* — U.S. —, 104 S.Ct. 892, 79 L.Ed.2d 56 (1984), argue that in federal court a state court judgment is to be given *only* that preclusive effect it would have in state court.

In this case, the original judgments rendered in state district court, and allowed to become final without appeal, would clearly have precluded a subsequent effort in state court to avoid the judgments. *Middleton v. Murff, supra,* 689 S.W.2d at 213; *King v. King, supra,* and the cases authorizing a waiver of the constitutionality issue by failure to raise this issue in the initial proceedings.

For these reasons this Court should decline to review this case.

## III.

### Federal Declaratory Relief Is Not Available To Protect An Individual From Enforcement Of A Final Judgment Rendered In State Court.

Petitioners contend that they are attacking the constitutionality of Family Code § 11.18(a). However, an analysis of their complaint and the arguments made in the Fifth Circuit and in this Court shows clearly that petitioners, though purporting to assert a § 1983 claim, in reality seek nothing more than relief from money judgments rendered in state district court in civil cases by

securing a ruling that such judgments are unconstitutional, hence null and void.

The authorities cited above establish that the federal courts do not sit as courts of appeal to review final state court judgments, particularly those in civil cases from which no appeal was taken to a higher state court. See also, *Rooker v. Fidelity Trust Co.*, 263 U.S. 413, 44 S.Ct. 149, 68 L.Ed. 362 (1923). Petitioners cite no cases as authority for their argument that federal declaratory relief is available in a case such as this.

The alleged "constitutional" claims presented by petitioners were "inextricably intertwined" with the state court's judgments. "[T]herefore the district court could not have properly reviewed the state court decision." *Hagerty v. Succession of Sawyer, supra,* 749 F.2d at 220.

Further, petitioners do not now face enforcement of an allegedly void statute, but of valid final judgments rendered by state district courts whose jurisdiction has not been questioned, and in which the constitutionality of the statute was not challenged. Even a holding at this point that Family Code § 11.18(a) is unconstitutional would not operate retroactively to invalidate final state court judgments based on that legislation. *Commonwealth v. Davis, supra,* 168 S.W.2d at 220.

As a result petitioners were not entitled to prospective declaratory relief in the district and circuit courts, which could only have taken the form of an order holding the judgments to be null and void. As shown above, the final and unappealed state court civil judgments for money damages are not void, and cannot be expunged by declaratory or other relief by the federal courts.

## IV.

### The Lower Courts Ruling On Petitioners' Claims Against The State Bar Of Texas Was Correct.

The circuit court did not rule that petitioners' claim against the State Bar of Texas was "not actionable under 42 U.S.C. §§ 1983 and 1985." It ruled correctly that this claim, seeking to assert an antitrust violation, has no merit.

Petitioners have not alleged or shown that they were damaged, or their civil rights were violated, by any action of the State Bar of Texas. There is no suggestion that either of the respondents who secured judgments for attorney's fees against petitioners attended any State Bar seminar or was influenced by State Bar activity. Petitioners have failed to allege or demonstrate causation and as a result, in addition to all the other reasons discussed above, their claims have no merit.

## V.

### The Court Should Award Attorney's Fees To Respondent Because Petitioners' Claims Are Frivolous.

Under Rule 49(b) this Court has authority to award damages to a respondent when a petition for writ of certiorari is frivolous. A proceeding is frivolous when it involves legal points not arguable on their merits. *Hagerty v. Succession of Clements, supra,* 749 F.2d at 222.

The rules of law controlling disposition of this case are well-settled and supported by precedent in this Court as well as the Fifth Circuit and state courts. Petitioners have cited no authority on point, no cases establishing a

legitimate conflict with the relevant decision, and no basis for a finding of a departure from accepted judicial standards—in short, no grounds for the granting of their application.

The history of this proceeding has been one of harassment of respondents, frivolous claims, and continued efforts by petitioners to avoid their legitimate obligations. They have ignored the procedures available to them to seek relief from judgments with which they are unhappy, have disregarded precedent that clearly demonstrates the impropriety of this proceeding, have been reprimanded by the Fifth Circuit on oral argument, and still have persisted in filing an Application in this Court.

As a result, as in the very similar case of *Hagerty v. Succession of Clements, supra,* this Court should award respondent compensation in the form of a reasonable attorney's fee incurred in responding to the petition.

—o—

## CONCLUSION

For the reasons discussed above the Court should refuse to grant a writ of certiorari in this case.

Respectfully submitted,

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Supreme Court, U.S.
FILED
OCT 15 1985
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-373

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1985

---

CHARLES REED AND ROLAND DUTY,
PETITIONERS

V.

JAMES TERRELL, SUE RAYBOLD, BILL LOGUE,
JOE JOHNSON, AND THE STATE BAR OF TEXAS,
RESPONDENTS

---

ON WRIT OF CERTIORARI
TO THE
UNITED STATES COURT OF APPEALS
FOR THE
FIFTH CIRCUIT

---

# BRIEF FOR RESPONDENT THE STATE BAR OF TEXAS IN OPPOSITION TO CERTIORARI

---

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EDITOR'S NOTE

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## STATEMENT OF THE CASE

Respondent has included this statement because Petitioners' statement is argumentative and conclusory. Moreover, Petitioners' statement creates the impression that the matters recited therein were presented as evidence to the trial court. There was no evidentiary hearing in this case.

Petitioners Charles Reed and Roland Duty filed this suit in the United States District Court for the Western District of Texas, Waco Division. A copy of the live pleading in the case is reproduced in the Appendix of this brief. They alleged that the imposition of attorney's fees against them as parties in divorce actions was unconstitutional because the statute which allowed awards of attorney's fees in such cases, Tex. Fam. Code Ann. §11.18(a), was applied in a discriminatory manner against men. Named as defendants in the suit were

the attorneys who represented Petitioners' ex-wives (Respondents Terrell and Raybold), the state district judge who heard the divorce actions (Respondent Logue), the clerk of the court in which the divorce actions were filed (Respondent Johnson) and this Respondent, the State Bar of Texas.

The gist of Petitioners' argument against Respondents Terrell, Raybold, Logue and Johnson was that these individuals had acted in concert to cause Tex. Fam. Code Ann. §11.18(a) to be enforced in a discriminatory manner. Petitioners alleged that there were no ascertainable standards to which judges could refer in the exercise of their discretion in determining whether one party in a divorce action would pay the other party's attorneys fees. Petitioners claimed that this lack of guidelines permitted judges and wives' attorneys to discriminate against

the class of ex-husbands by requiring them to pay their former spouses' attorneys fees even when such awards were unjustified.

The allegations against the State Bar of Texas concerned the content of a seminar on family law presented by the State Bar and the existence of a conspiracy of fixed prices. Petitioners alleged that in that seminar, attorneys were instructed to advise their female divorce clients to withdraw all funds from joint bank accounts and to conceal the money in various ways. Petitioners allege that attorneys were further instructed to represent falsely to the court that their female clients were without funds to pay their fees and to request that the husbands be required to pay them.

The price-fixing allegation consisted of a vague statement that the State Bar and local lawyers in Petitioners' communi-

ty set minimum fees to overcharge them and other husbands.

Petitioners made the conclusory allegation that they had exhausted any state remedy at law that might have been available to them. They requested that the court declare §11.18(a) unconstitutional; declare that all orders issued pursuant to that statute are void; grant injunctive relief to prevent further enforcement of such orders in their cases; assess compensatory and punitive damages; and award attorneys fees connected with the suit.

All Respondents filed motions to dismiss. No evidentiary hearing was held. The district court granted these motions, noting that the Petitioners' complaint was in essence an attack on state court judgments which had not been reviewed by Texas appellate courts. A copy of this Order of Dismissal may be found in the Appendix of Petitioners' brief. Additional reasons

for dismissal mentioned in the court's Order of Dismissal included the failure of Petitioners to state a federal cause of action on which relief can be granted.

Petitioners appealed to the Fifth Circuit Court of Appeals. The first four points of their brief simply repeated and elaborated on the allegations made in their petition. In the fifth point, they alleged that their allegation of "action in concert" by the various defendants should have been sufficient to withstand a motion to dismiss. The sixth point complained of the trial court's denial of their motion to amend their petition to include additional allegations of attempts by their ex-wives' attorneys to collect their fees. Finally, the seventh point concerned the lack of notice given of the hearing on the motions to dismiss.

In a concise opinion, the Fifth Circuit affirmed the district court's dismis-

sal of the case. Petitioners have included a copy of that opinion in the Appendix of their brief. The Fifth Circuit opinion described the allegations against the State Bar of Texas as having no merit. The Court of Appeals agreed with the district court's view that this case is essentially an attack on a state court judgment which a federal district court may not consider.

## SUMMARY OF THE ARGUMENT

The United States Court of Appeals for the Fifth Circuit properly applied the holding of District of Columbia Court of Appeals v. Feldman, 460 U.S. 462, 103 S.Ct. 1303 75 L.Ed.2d 206 (1983), to the case at bar and concluded that the district court lacked jurisdiction to decide Petitioners' claims because they were inextricably intertwined with the state court's decisions. Petitioners' failure to state a federal claim on which relief

could be granted also supports the trial court's action.

## ARGUMENT

In District of Columbia Court of Appeals v. Feldman, 460 U.S. 462, 103 S.Ct. 1303, 75 L.Ed.2d 206 (1983), this Court held that federal district courts have no authority to review final judgments of state courts. The Feldman decision recognized a small category of cases which had been adjudicated in state courts but presented issues which could be determined in federal district courts. These cases involve a general challenge to the constitutionality of a state rule rather than requiring a review of a state court's final judgment.

Petitioners have employed the terminology of civil rights cases to frame their complaints. They have cited 42 U.S.C. §1983 and alleged that requiring them to pay attorneys fees in unconstitutional.

However, this construction of the issues is forced. This is obvious from their characterization of husbands as a suspect class to demonstrate a denial of equal protection. It is also obvious from the contradictions inherent in their petition: the allegation that the State Bar's legal education program advised attorneys to conceal wives' assets in order to obtain attorney's fees pursuant to Tex. Fam. Code Ann. §11.18(a) implies that state courts apply that statute on the basis of need rather than in a impermissibly discriminatory manner.

A more realistic view of Petitioners' claim is that it is nothing more than a complaint that the state court abused its discretion in assessing attorney's fees. The petition consists of a litany of actions taken against Reed and Duty in their state cases and the request for re-

lief is directed at remedying the effect of those actions.

The Fifth Circuit was correct in finding that Petitioners were attempting to obtain review of state court judgments in their federal suit and that the federal district court lacked jurisdiction to do so. Petitioners' argument that Migra v. Warren City School District Board of Education, 104 S.Ct. 829 (1984), dictates another result is incorrect. Migra held that litigants who fail to raise claims in state court suits will be precluded from raising those claims in §1983 actions in federal court to the same extent as in subsequent state actions. Under Migra, it is clear that Petitioners' claims are barred by their failure to raise them in state court. This decision does not provide any support for retention of the case by the district court nor do the cases cited in Petitioners' second point which

appears to be much the same argument as in their first point.

No Cause of Action on Which the Federal Court May Grant Relief

No facts were alleged by Petitioners which demonstrated that the attorneys fees statute was unfairly applied in their cases. Except for a few specific references to dates and amounts of attorneys fee awards, the entire petition consists of vague and conclusory statements.

The State Bar of Texas was not alleged to be responsible for the promulgation, interpretation or enforcement of Tex. Fam. Code Ann. §11.18(a). Furthermore, the absence of any allegation connecting the acts which the State Bar allegedly committed and any harm to Petitioners (or to anyone else) reveals that the claim against the State Bar is simply frivolous.

## CONCLUSION

The district court correctly dimissed this case because it lacked jurisdiction to sit in direct review of the state court's judgments. The Petitioner's failure to state a cause of action on which relief may be granted also justified the district court's dismissal.

The Petition for Writ of Certiorari to the Fifth Circuit Court of Appeals should be denied and pursuant to 42 U.S.C. §1988 and U.S. Sup. Ct. Rule 49.2, Respondent's attorneys fees in responding to this Petition should be assessed against the Petitioners.

Respectfully submitted,

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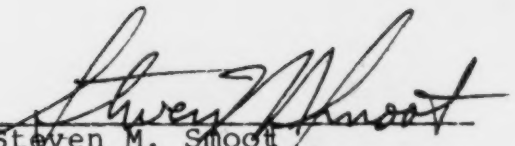
By 
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ATTORNEYS FOR RESPONDENTS

CERTIFICATE OF SERVICE

I, Steven M. Smoot, counsel of record for Respondent State Bar of Texas, do hereby certify that on this the 10th day of October, 1985, three (3) copies of the above and foregoing Brief for Respondent were served by mail on the following:

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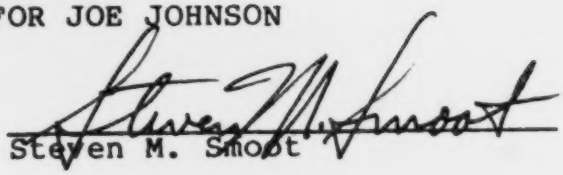

Steven M. Smoot

# APPENDIX

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
WACO DIVISION

CHARLES REED, and
ROLAND DUTY; Plaintiffs

W-82-CA-75
JURY TRIAL
REQUIRED

V.

JAMES TERRELL and SUE RAYBOLD, individually and as officers of the Courts of Texas and members of the State Bar of Texas; BILL LOGUE, individually and as Judge of the District Court of McLennan County, Texas; JOE JOHNSON, individually and as Clerk of the District Courts of McLennan County, Texas; and THE STATE BAR OF TEXAS; Defendants

VERIFIED AMENDED COMPLAINT FOR MONETARY DAMAGES AND DECLARATORY AND INJUNCTIVE RELIEF

1. This action for declaratory and injunctive relief and monetary damages arises under the Fourteenth Amendment to the United States Constitution, Title 15, United States Code Section 1 et seq., and Title 42, United States Code Sections 1983, 1985, and 1986. The matter in controversy exceeds, exclusive of interests and costs, the sum of Ten Thousand Dollars ($10,000). This Court has jurisdiction

under 28 United States Code Sections 1331, 1343, 2201, 2202, and 2281.

2. All individual parties are citizens of the United States and of Texas.

3. Both plaintiffs are members of the class "husbands or former husbands" and have a direct interest in the integrity, equality, and justness of the family court division of the District Courts of Texas, in maintaining equality at law for all litigants in the family court division of the District Courts of Texas, and in insuring compliance with all Constitutional provisions and laws designed to preserve the foregoing interests, specifically the last two clauses of Section I of the Fourteenth Amendment, the "due process" clause and the "equal protection" clause, and the antitrust laws of the United States.

4. Defendants James Terrell and Sue Stepp Raybood, hereinafter Terrell and

Raybold, respectively, are both attorneys at law, admitted to the Defendant State Bar of Texas under color of law, and acting at all times herein under color of state law.

5. Defendant Bill Logue, hereinafter Logue, is Judge in the family court division of the District Court of McLennan County, Texas, admitted to the Defendant State Bar of Texas under color of law, and acting at all times herein under color of state law.

6. Defendant Joe Johnson, hereinafter Johnson, is the Clerk of the District Courts of McLennan County, Texas, and acting at all times herein under color of state law.

THE DUE PROCESS CLAUSE

7. The Fourteenth Amendment's next-to-the-last clause of Section 1 provides as follows:

> No state shall . . . deprive any person of life, liberty,

> or property, without due process of law.

This clause sought to prevent, and prevents, the arbitrary dispossession and seizure of property under the color of state law, and the arbitrary punishment of any person under color of state law for pursuit of his legal rights and remedies.

THE EQUAL PROTECTION CLAUSE

8. The Fourteenth Amendment's last clause of the First Section provides as follows:

> No state shall . . . deny to any person within its jurisdiction the equal protection of the laws.

This clause sought to prevent, and prevents, discrimination, under color of state law, against any classification, including classification by sex, whether such discrimination is obvious on the face of the state law, or is exercised by enforcement of the law, fair on its face,

with a "heavy hand or an evil eye" so as to discriminate against any class.

THE U.S. ANTITRUST LAWS

9. The Sherman and Clayton Acts, Title 15, United States Code, Section 1 et seq., provide that interstate trades, including the practice of law, shall not be practiced so as to injure, obstruct, or overcharge one group or classification of customers or consumers to the benefit of another.

TEXAS FAMILY CODE AND CIVIL CASE LAW

10. Section 11.18(a) of the Texas Family Code provides as follows:

> In any proceeding under this subtitle, including but not limited to habeas corpus, enforcement, and contempt proceedings, the court may award costs. Reasonable attorney's fees may be taxed as costs, and may be ordered paid directly to the attorney, who may enforce the order for fees in his own name.

Civil Case Law provides that:

> Attorney's fees are not re-

coverable in an action unless so provided by statute or by contract between the parties. Statutes which authorize recovery of attorney fees are penal in nature and will be strictly construed. (Marriage of Neidert, 583 S.W.2d 461)

APPLICATION OF DUE PROCESS OF LAW

11. Section 11.18(a) of the Texas Family Code contains no "ascertainable standards" upon which a defense can be made against its application, is completely "arbitrary" and "discretionary," is "vague and idefinite," is incapable of being "strictly construed," denies the right to "cross-examine the accusor" or even to be accused, "chills the ardor" to pursue one's rights, and for each of these reasons is a denial of due process of law to anyone against whom it is applied.

APPLICATION OF EQUAL PROTECTION OF THE LAW

12. Section 11.18(a) of the Texas Family Code contains no references to gender and appears fair on its face, but in

practice, is administered with a heavy hand and an evil eye in family law cases, in that, to the plaintiffs' knowledge, legal fees are not assessed against guilty or innocent defendants in criminal cases, no matter how wealthy, or how apparent the guilt, or how deliberate and vicious the acts of the defendant, nor are legal fees assessed against litigants in civil matters other than domestic litigation, such as personal injury and other tort case, breach of contract, contempt or civil conspiracy litigation, no matter how wealthy the litigant. In addition, to the Plaintiffs' knowledge, no wife or ex-wife has ever been assessed the husband's or ex-husband's legal fees in a family court case. Members of the class "husbands" are thus denied, in McLennan County Courts, the equal protection of the law in divorce and other family court litigation.

CIVIL CONSPIRACY

13. Since before April 12, 1978, the named individual Defendants, and other individual members of the Defendant State Bar of Texas have conspired to cause, and have caused, the provisions of the Texas Family Code concerning legal fees to be enforced in a discriminatory manner against men, and have entered these discriminatory and unconstitutional orders and caused executions to be issued on the basis of these unconstitutionally discriminatory orders. "Defendants have also conspired to cause, and have caused, lawyers specializing in family law in Texas to be instructed to conspire with female divorce clients to commit, and they have committed, grand larceny by fraud, conversion, and the stealing and concealing of joint family funds to buy jewelry and other valuables." Defendants have also conspired to force, and have forced, the payment of wives' lawyers' fees by the un-

constitutional use of legal contempt procedures.

OVERT ACTS

14. In effecting the goals of the above-described conspiracy, the Defendants, and others knwn and unknown to Plaintiffs, have, at various times, and in various places, in McLennan County and elsewhere in Texas, performed the following overt acts:

A. On April 12, 1978, and on May 19, 1978, Defendant Raybold unconstitutionally requested that Plaintiff Duty be required to pay $2,900 in legal fees for his wife's divorce litigation, and on July 17, 1978, Plaintiff Duty was ordered by Defendant Logue to pay $2,900 in unconstitutional legal fees to Defendant Raybold, and this order was entered by Defendant Johnson, so that it might be enforced, and it was enforced, by Defendant Raybold, even though Defendant Raybold's clent had

been awarded sufficient property, and owned sufficient property, and had sufficient earning power to pay her own attorney's fees.

B. On November 1, 1979, Plaintiff Reed was ordered to pay Defendant Terrell $819.27 in legal fees by Defendant Logue, even though such an order was not legal according to Rule 131 of the Texas Rules of Civil Procedure for the reason that Plaintiff Reed was a successful party, and the order was entered by Defendant Johnson, so that it might be enforced, and it was enforced, by Defendant Terrell, even though Terrell's client had been awarded and owned sufficient property, and had sufficient earning power to pay her attorney's fees.

C. On January 29, 1981, Plaintiff Reed was ordered to pay Defenant Terrell $2,500 in domestic legal fees by Defendant Logue, after an unconstitutional request

for such fees from Defendant Terrell, and this order was entered by Defendant Johnson, so that it might be enforced, and Defendant Terrell has attempted to enforce it. Defendant Reed paid all but $2,490 of the unconstitutional fee, whereupon Defendant Terrell wrote, and filed, and caused to be served on Plaintiff Reed, an action seeking to restrain Plaintiff Reed from refusing to accept and cash his Veterans Administration paychecks in the future and not turning the proceeds of such cashing over to Defendant Terrell, without any limit on such cashings and payments. See Exhibit A, attached hereto, the order of Judge Logue setting up the hearing for April 16, 1982. Defendant Logue ordered a hearing on April 16, 1982, at which Plaintiff Reed will be unconstitutionally required to meet the burden of proof as to why the order would not be entered against him.

D. On November 12, 19__, Defendant State Bar of Texas held a legal education program in family law, for which credit was granted toward family law certification, and instructed the Defendant members of the State Bar in attendance that they should have their female divorce clients steal all the money in the family joint checking and savings accounts, and purchase jewelry and other valuables with the money, any pay legal fees "deposits" with the funds obtained, and that the lawyers should then ask the courts to "award" such jewelry to their female clients, and also ask for legal fees from the husbands, falsely and fradulently representing that the wives did not have sufficient property to pay legal fees for themselves.

CAUSES OF ACTION

15. Defendants' actions, as described in Paragraphs 13 and 14, in preparing, arguing, and filing applications

for legal fees against the husbands or former husbands in favor of the wives or former wives, extorting payment under threat of imprisonment for debt, and the fraud on the state courts by the Defendant lawyers and State Bar of Texas, are violations of 18 United States Code Sections 241, 242, 42 United States Code Sections 1983, 1985, and 1986, and the Due Process and equal Protection clauses of the Fourteenth Amendment to the United States Constitution. There is no great state or societal benefit justifying the exercise of such discriminatory enforcement of the Texas Family Code setting up an inherently-suspect class "husbands."

16. Plaintiffs have suffered greatly economically and emotionally from Defendants' conduct in exercising these statutes and rules unconstitutionally, and illegally, and have suffered greatly by being discriminated against in the restraint of

trade and "price discrimination" in violation of the equal protection of the law, and such conduct on the part of the Defendants has frustrated the purpose of the Texas Family Code set forth in Paragraph 10 above, and the federal laws set forth above, which purposes were to provide to all persons due process of law and protection from discrimination under color and pretense of state law, statute, regulation, custom, or usage, and protection against monopolistic acts in any trade and business.

17. As a direct consequence of the aforesaid conspiracy to violate, and violations, Plaintiff's have suffered, and will continue to suffer, great and immediate, irreparable injury in that their liberty is restrained, and their property is in jeopardy. They are required to take steps to protect themselves against the enforcement of the unconstitutional orders

against them, and/or retain counsel at great difficulty and expense, with payments to said counsel illegally controlled by the previously-enforced minimum fee schedule and the present tacit agreement of McLennan County lawyers and the State Bar of Texas, contrary to Title 15, United States Code Sections 1, 2, 13, and 15.

18. Plaintiffs have suffered mental pain and anguish at being forced to pay, or suffer imprisonment and loss of visitation with their children, for failure or inability to pay, unconstitutionally assessed legal fees of a discriminatory nature, which fees are used to pay lawyers for instructing their clients to commit the crimes described in the Pre-Divorce Counselling instruction books of the continuing legal education classes of the Defendant State Bar of Texas.

19. Plaintiffs have suffered mental pain and anguish, and other injury and out

of pocket expenses, totalling the sum of $28,000 each.

20. Plaintiffs have no adequate remedy at law, and have exhausted any state remedy at law that might have been available to them. The only available remedy by which Plaintiffs might assert their direct and substantial interest in securing compliance with the provisions of Title 18 United States Code Sections 241, 242, and 72 United States Code Sections 1983, 1985, and 1986, and the due process and equal protection of the law is to bring this action.

RELIEF SOUGHT

Wherefore, Plaintiffs request that this Court:

A. Declare that Section 11.18(a), Texas Family Code, as it is applied and enforced by the family courts of McLennan County, Texas, is unconstitutional, that all outstanding orders for payment under

this statute against the Plaintiffs are null, void, and unenforceable, that any payments made by Plaintiffs under this statute to Defendants are to be refunded immediately and that any orders arising from criminal or quasi-criminal or civil contempt proceedings against any of the Plaintiffs in the family courts of McLennan County, Texas are unconstitutional and unenforceable, and direct Defendant Johnson to strike any such unconstitutional orders from the records of the District Courts of McLennan County, Texas.

B. Grant a Temporary Restraining Order preventing and restraining the Defendants, and their agents, associates, and employees from making, entering, or enforcing any order against Plaintiff Reed that he must endorse and cash any and all of his future Veterans Administration paychecks and turn any or all of the proceeds over to Defendant Terrell.

C. Upon hearing, which should be scheduled as soon as possible, issue preliminary and permanent injunctions preventing Defendants from exercising any benefits from any of the unconstitutional orders outstanding against any of the Plaintiffs, and effecting the above-requested declaratory relief permanently.

D. Require that any sums paid to any of the Defendants by any of the Plaintiffs under the unconstitutionally-administered Section 11.18(a) of the Texas Family Code be refunded by the Defendants to the Plaintiffs involved, with interest at 15% from the time of the original payment to the Defendants.

E. Convene a petit jury to assess damages jointly and severally against the Defendant lawyers and curt clerk in the sum of $28,000 compensatory damages for each Plaintiff, and assess treble damages against the Defendant lawyers and court

clerk, jointly and severally, as punitive damages for violation of the Sherman and Clayton anti-trust laws.

F. Order such costs, disbursements, and attorney's fees, if any, or reasonable sums in lieu of attorneys' fees, to which the Plaintiffs may be entitled from the Defendants.

G. Order such other and further relief as the Court may deem appropriate.

By the Plaintiffs,
Pro Se

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Roland Duty
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Phone: 817-772-1532

STATE OF TEXAS, COUNTY OF McLENNAN:

I, Charles Reed, first being duly sworn, depose and say as follows:

1. That I am a plaintiff in the above-entitled cause, W-82-CA-75.

2. That I have read the complaint in the above-entitled cause; and

3. That all factual statements and allegations made therein are true, as to those of which I have direct knowledge, and as to all those facts and allegations of which I have no direct knowledge, I believe them to be true, to the best of my information, knowledge, and belief.

Signed May ____, 1982

_____
Charles Reed

Subscribed to and sworn before me this ___ day of May, 1982.

My Commission Expires:

_____

_____
Notary Public

STATE OF TEXAS, COUNTY OF McLENNAN:

I, Roland Duty, first being duly sworn, depose and say as follows:

1. That I am a plaintiff in the above-entitled cause, W-82-CA-75.

2. That I have read the complaint in the above-entitled cause; and

3. That all factual statements and allegations made therein are true, aas to those of which I have direct knowledge, and as to all those facts and allegations of which I have no direct knowledge, I believe them to be true, to the best of my information, knowledge, and belief.

Signed May ____, 1982

_____
Roland Duty

Subscribed to and sworn before me this ___ day of May, 1982.

My commission expires:

_____

_____
Notary Public

Supreme Court, U.S.
FILED
OCT 15 1985
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-373

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1985

CHARLES REED AND ROLAND DUTY,
Petitioners,

v.

JAMES TERRELL, SUE RAYBOLD, BILL LOGUE
JOE JOHNSON, AND THE
STATE BAR OF TEXAS,
Respondents.

# PETITIONERS REPLY TO RESPONDENT SUE RAYBOLD'S OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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## REPLY TO OPPOSITION

Respondent Raybold's opposition is based on argument and authorities which are not on point with the facts of this case.

Petitioners, as state-court defendants in an action based solely on an arbitrary state statute, had no choice between a state and federal forum, had no basis for appealing state-court judgments without raising their federal claims in state court, and could not have raised their federal claims in state court without forfeiting their right to a federal forum. In addition, the opposition cites no authority, and there is none, for the proposition that any person is ever required to submit his federal claims to be decided by the same state officials accused of depriving those federal rights.

Respondent Raybold's attorneys also made false statements in the opposition

which appear designed to prejudice this Court against Petitioners, and which reflect contempt for this Court.

For these and the other reasons discussed herein, this Court should reject Respondent Raybold's opposition.

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No. 85-373

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

---

CHARLES REED AND ROLAND DUTY

Petitioners,

v.

JAMES TERRELL, SUE RAYBOLD, BILL LOGUE

JOE JOHNSON, AND THE

STATE BAR OF TEXAS,

Respondents.

---

# PETITIONERS REPLY TO RESPONDENT SUE RAYBOLD'S OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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## OPINION BELOW

The judgments and opinions in the courts below are attached as appendices to petitioner's petition.

## STATEMENT OF THE CASE

Respondent Raybold has alleged that the Statement of the Case as presented in the original petition contains "material largely outside the record", "slanted and argumentative presentations of the proceedings below", "misstatements of the state law", "facts assumed but not in evidence", and "other improper material", yet makes no effort to specify where our Statement of the Case is in error.

We contend that the original statement of the case is correct.

I.

V. T. C. A. FAMILY CODE SECTION 11.18(a) IS ARBITRARY AND IS APPLIED ONLY AGAINST MEN.

Respondent Raybold argues that Family Code Section 11.18(a) "is not arbitrary, and does not apply only against men."

Respondent Terrell stated in his original answer to this complaint:

> ". . . this Defendant admits that Section 11.18(a) of the Texas Family Code contains no standards governing its application. . . "

In addition, Texas courts have consistently held that application of Section 11.18(a) in a particular case is left to the sole discretion of the court. Drexel v. McCutcheon 604 S. W. 2d 431.

It is the arbitrary nature of Section 11.18(a) that allows it to be applied only against men. Respondent Raybold's argument that it "does not apply only against men" is irrelevant, since this Court ruled that

a law, fair on its face, is unconstitutional if it is applied "with an evil eye and an unequal hand". Yick Wo v. Hopkins, 118 U. S. 356, 6 S. Ct. 1064.

Thus, this Court should reject Respondent Raybold's unsupported argument that Section 11.18(a) is not arbitrary, and her irrevelant argument that Section 11.18(a) does not apply only against men.

## II.

## 42 U. S. C. SECTION 1983 WAS INTENDED TO ENFORCE THE PROVISIONS OF THE FOURTEENTH AMENDMENT AGAINST STATE ACTION, WHETHER THAT ACTION BE EXECUTIVE, LEGISLATIVE OR JUDICIAL.

Respondent Raybold bases her opposition on the argument that Section 1983 does not apply against state judicial action. This Court rejected that argument in Mitchum v. Foster 407 U. S. 225, 92 S. Ct. 2151; Lugar v. Edmondson Oil, 102 S. Ct. 2744; Haring v. Prosise, 462 U. S. 306, 103 S. Ct. 2368;

Pulliam v. Allen, 104 S. Ct. 1970, and countless other cases.

This Court declared in Gomez v. Toledo, 446 U. S. 635, at page 640:

> "by the plain terms of Section 1983, two--and only two--allegations are required in order to state a cause of action under that statute. First, the plaintiff must allege that some person has deprived him of a federal right. Second, he must allege that the person who has deprived him of that right acted under color of state or territorial law."

The opinion of the Fifth Circuit in this case did not find an absence of either of these elements in the present case.

Respondent Raybold pretends that Petitioners are attacking the facts found by state courts, which serve as the basis for the state-court judgments in this case. Petitioners do not seek federal review of any fact found by any state court--Petitioners' claim is that facts are irrelevant to state-court judgments

under Family Code Section 11.18(a). Petitioners do not claim that Section 11.18(a) was applied other than intended against them--Petitioners claim is that it was applied exactly as intended.

This Court ruled in England v. Louisiana Board of Medical Examiners, 375 U. S. 411, 84 S. Ct.4671, at U. S. 419, that:

> ". . . if a party freely and without reservation submits his federal claims for decision by the state courts,. . . he has elected to forgo his right to return to (Federal) Court. . ."

Respondent Raybold argues the opposite; that Petitioners forfeited their federal claims by not raising them in state court.

Respondent Raybold argues that Petitioners' only avenue for a federal review of their federal claims is to run the obstacle course of the hostile state appeals process and then request a writ of certiorari from this Court. (This argument

ignores the right to appeal to this Court under 28 U.S.C. 1257(2) where the validity of a state law is at issue.) This Court declared in England, supra, at U.S. 416, that:

> "But such review. . . is an inadequate substitute for the intial District Court determination to which the litigant is entitled in the federal courts."

This rule is particularly applicable to the present case where state-court judges are accused of violating constitutional rights.

Respondent Raybold has failed to advance any reason why Mitchum v. Foster, supra, and Haring v. Prosise, supra, do not apply in this case. This Court stated in Haring, at U.S. 313, that:

> "In federal actions, including Section 1983 actions, a state-court judgment will not be given collateral estoppel effect where the party against whom an earlier court decision is

> asserted did not have a full and fair opportunity to litigate the claim or issue decided by the court."

Petitioners did not have a "full and fair" opportunity to litigate when the arbitrary Section 11.18(a), against which there is no defense, was applied against them.

Respondent Raybold cites no authority for her argument that a judgment, based solely on an unconstitutional state statute, is not void. Her argument that unconstitutional statutes yield valid judgments should be rejected.

Respondent Raybold's argument that federal declaratory relief cannot be invoked to prevent enforcement of a final state-court judgment is also unfounded. See Henry v. First National Bank of Clarksdale, 595 F. 2d 291,(Fifth Circuit), and Gresham Park Community Organization v. Howell, 652 F. 2d 1227.(Fifth Circuit)

Respondent Raybold argues that the Fifth Circuit did not rule that Petitioners' claim against the State Bar of Texas was not actionable under 42 U.S.C. Section 1983 and 1985. Petitioners raised this claim in District Court, and on appeal. Since Petitioners' claims, in their entirety, were rejected by the Fifth Circuit, the claims against the State Bar under Section 1983 and 1985 were also rejected.

Respondent Raybold's opposition cites numerous cases which are not on point with this case for a variety of reasons. In these cases, the litigants were state-court plaintiffs who, failing there, attempted to relitigate the same issues in federal court based upon the same operative facts.

For the foregoing reasons, this Court should reject Respondent Raybold's argument that state judicial action precludes a 42 U. S. C. Section 1983 suit.

## III.

## THE FIFTH CIRCUIT DID NOT REPRIMAND PETITIONERS AT ANY TIME, NOR DID THE FIFTH CIRCUIT FIND PETITIONER'S CLAIMS TO BE FRIVOLOUS.

Respondent Raybold's attorneys state in her opposition that Petitioners "have been reprimanded by the Fifth Circuit on oral argument". This statement is completely false, has no basis whatever in fact, appears designed to prejudice this Court against Petitioners, and reflects contempt for this Court and its lofty purposes.

The attorneys for both Respondents Terrell and Raybold made similar false statements reflecting upon the character of Petitioners during oral arguments before the Fifth Circuit. This Court should apply appropriate sanctions against Respondent Raybold's attorneys for this contemptable and inexcusable behavior.

Respondent Raybold cites Hagerty v. Succession of Clements, 749 F.2d. 217, as the basis for her argument that Petitioner's claims are frivolous. Petitioners appeal to the Fifth Circuit was filed four months before Hagarty, yet judgment in this case was rendered five months after judgment in Hagarty. Oral arguments were ordered in this case at the same time Hagarty was being summarily disposed of.

The Fifth Circuit did not find, or even imply, that Petitioners' claims were frivolous. Instead, this case was one of only 42% of the cases filed in the Fifth Circuit which proceed to oral arguments. At the time judgment was rendered in this case by the Fifth Circuit, this case had been in the Fifth Circuit for 16 months and was one of the oldest cases on its docket. It also took the U. S. District Court 18 months to proceed to judgment in this case.

Further, the Fifth Circuit, in its opinion, did not find an absence of either of the two essential elements listed in Gomez v. Toledo, supra, for a 42 U. S. C. Section 1983 cause of action.

For these reasons, Respondent Raybold's claim that Petitioners' petition is frivolous is unfounded and should be rejected by this court.

## CONCLUSION

Based on the foregoing arguments and authorities, the petitioners pray that Respondent Raybold's Opposition to our Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit be denied and that our Petition be granted.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I, Roland Duty, hereby certify that a true copy of Petitioners Reply to Respondent Raybold's Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit has been mailed, United States mail, postage prepaid, to counsel of record for each respondent therein on this 12th day of October, 1985, properly addressed to each as follows:

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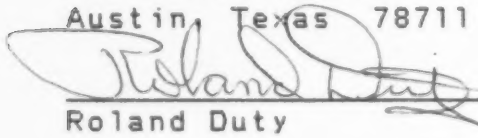

Roland Duty

Supreme Court, U.S.
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(5)

NO. 85-373

IN THE
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OCTOBER TERM, 1985

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CHARLES REED AND ROLAND DUTY,

PETITIONERS

V.

JAMES TERRELL, SUE RAYBOLD, BILL LOGUE, JOE JOHNSON AND THE STATE BAR OF TEXAS,

RESPONDENTS

---

ON WRIT OF CERTIORARI
TO THE
UNITED STATES COURT OF APPEALS
FOR THE
FIFTH CIRCUIT

---

# BRIEF FOR RESPONDENT JOE JOHNSON IN OPPOSITION TO CERTIORARI

---

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## REASONS FOR DENYING THE WRIT

The rationale of the Petitioners' position to justify this Court to grant a Writ of Certiorari to the Fifth Circuit Court of Appeals is that the Respondents acted in conjunction with each other to cause Texas Family Code §11.18(a) to be enforced against them as a class, consisting of husbands and ex-husbands, in deprivation of their "civil rights" under 42 U.S.C. §1983. It is fundamentally clear that "a plaintiff may not seek a reversal of a state court judgment simply by casting his complaint in the form of a civil rights action." Hagerty v. Succession of Clements, 749 Fed.2d 217, 220 (Fifth Circuit, 1984).

Petitioners further attempt to seek justification for the granting of the Writ by alleging that the state statute is unconstitutional and therefore, should automatically be eligible for review by this Court. Once again, it is fundamentally clear to

this Respondent that state court final judgments cannot be reviewed by this Court until all of the state appellate remedies have been exhausted. District of Columbia Court of Appeals v. Feldman, 460 U.S. 462, 482, 103 S.Ct. 1303, 75 L.Ed. 2nd 206, 222-23 (1983). Also, please see the Fifth Circuit's Opinion in this cause and the cases cited therein which has been attached to other briefs filed herein and to which reference is made for all purposes.

## NO CAUSE OF ACTION ON WHICH FEDERAL COURT MAY GRANT RELIEF AGAINST THIS RESPONDENT

This Respondent is the duly elected and certified District Clerk of McLennan County, Texas. By Texas statute (RS 1899) and State Constitution (Art. V, Sec. 9), he is an officer of the court and is obligated to file and record in his office the everyday business of the four District Courts in his county. In the original causes upon which this

federal appeal is based and in Respondent's official capacity, he was given certain Orders duly entered by the State District Courts and he properly filed said Orders and issued whatever writs and took whatever other action the Orders required him to take. Further, at no time did he attempt to interpret or take it upon himself to enforce Texas Family Code Ann. §11.18(a) and there is no allegation to this effect in the Petitioners' complaint.

This Respondent stands ready at all times to abide by the Orders of any court having legal jurisdiction over the operation of his office. De Los Fuentes v. MacDonald, 85 Tex. 132, 20 S.W.43; Binge v. Foster, 47 S.W.2d 862.

## CONCLUSION

It is this Respondent's opinion that the rules of law applicable to this case, federal, state and statutory, compel a finding that the application for

Writ of Certiorari sought herein is frivolous on its face as it relates to him since there is nothing in the Petitioners' Application to this Court or their original complaint that is evidentiary or can be argued on its merits. Hagerty v. Succession of Clements, supra, 749 F.2d 222. This Respondent has done nothing to harm the Petitioners herein but has only performed his duties as required by law.

Therefore, it is submitted to this Court that the Petition of Writ of Certiorari to the Fifth Circuit Court of Appeals should in all things be denied and should this Court believe it appropriate, pursuant to 42 U.S.C. §1988 and U.S. Sup. Ct. Rule 49.2, attorneys fees in favor of this Respondent should be awarded against the Petitioners.

Respectfully submitted,

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I, Donald O. Hall, counsel of record for Respondent, Joe Johnson, do hereby certify that on this 21st day of October, 1985, three (3) copies of the above and foregoing Brief for Respondent were served by mail on the following:

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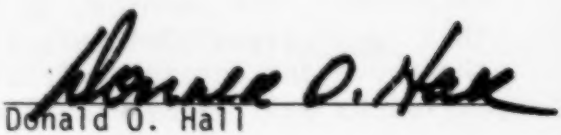

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(6)

No. 85-373

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IN THE
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# PETITIONERS' REPLY TO STATE BAR OF TEXAS' OPPOSITION TO CERTIORARI

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EDITOR'S NOTE

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## STATEMENT OF THE CASE

The State Bar of Texas' opposition creates the false impression that the Petition for a Writ of Certiorari in this case recites numerous facts which were not in the record for the courts below, and implies that all the factual allegations relevant to this case are contained in Petitioners' Verified Amended Complaint, which is included in the appendix of the State Bar's opposition.

The record in this case contains voluminous publications by the State Bar of Texas attached as exhibits, the bulk of which makes it impossible to include them in the appendix to this petition. The record in this case also includes pleadings not allowed to be filed by the District Court because the court intended to dismiss the complaint, as well as the transcripts of two District Court hearings and other sworn pleadings. Petitioners' Statement of the Case is correct as stated.

## SUMMARY OF THE ARGUMENT

The State Bar of Texas' opposition missrepresents the facts available in the record of this case, cites cases not on point with this one, alternately argues different sides of the same questions, is logically inconsistent, and should be rejected for these and other reasons.

## ARGUMENT

The State Bar of Texas pretends this case does not involve a "general challenge to the constitutionality of a state rule", then alternately argues that Petitioners did not allege facts to show that V.T.C.A. Family Code Section 11.18(a) was missapplied in their cases, thus arguing both sides of the same question.

Petitioners do not claim Section 11.18 was missapplied against them, in which case an appeal would be the obvious remedy. Petitioners' claim is that the law, both on its face and as applied, is uncon-

stitutional because it is arbitrary and is applied only against men, and therefore denies an effective appeal for the same reason it is unconstitutional in the first place. An appeal has no foundation where it complains a law was applied in a case the same as it is applied in other cases generally.

Thus, Petitioners are making a general attack on the statute which serves as the sole foundation of the judgments, and not the specific findings of the court in reaching the judgments, per se. It is not required that Petitioners file a class-action suit in order to seek relief from class-based discrimination under an unconstitutional state law. Steffel v. Thompson, 415 U.S. 452, 94 S.Ct. 1209.

The State Bar cites cases where unsuccessful state-court plaintiffs, who chose the state forum, were barred from relitigating the same issues in federal court. Such cases have no application to this

case because Petitioners were state-court defendants and did not choose the state forum. This Court ruled in England v. Louisiana Board of Medical Examiners, 375 U.S. 411, 84 S.Ct. 461, at U.S. 416, that:

> "The possibility of appellate review by this Court of a state court determination may not be substituted, against a party's wishes, for his right to litigate his federal claims fully in federal court."

The sum of all the defenses raised by Respondents in this case represent a direct attack on this Court's rule in England. Further, and for the same reasons, such defenses represent a direct attack on both the intent and effect of 42 U.S.C. Section 1983, since they claim deprivations of constitutional rights are sanctified under the cloak of state judicial authority.

The State Bar pretends that the statute on attorneys' fees is the only issue in this case, citing no authority to show the State Bar cannot be enjoined from teaching and promoting unconstitutional sexual discrimination in other areas of family law.

The State Bar's claim for attorney's fees in this case is unfounded for all the reasons stated in Petitioners' Reply to Respondent Sue Raybold's Opposition. In addition, the claim's sole premise is that this Court is incapable of recognizing a frivolous petition without the State Bar's assistance. If Petitioner's petition were frivolous, the State Bar would not have found it necessary to even respond to it. Thus, this claim should be rejected.

## CONCLUSION

For the foregoing reasons, the State Bar of Texas' opposition to certiorari should be rejected by this Court.

Respectfully submitted,

Charles Reed

Roland Duty